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REVIEW ESSAY



Constitutionalism and antiquity transformation*

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ABSTRACT

Straumann presents a grand narrative: Roman constitutionalism in the West from the age of Cicero to the American Founding Fathers. His project is forensic, mounting a case framed in terms of a dichotomy between the Greek ethical and political tradition of Plato and Aristotle which emphasizes civic virtue (Pocock's classical republicanism), and the Roman-law based constitutionalism of Cicero (Skinner's version). But this is too easy. Cicero was heavily influenced by Aristotle; and the very survival of Western civilization depended on translation movements, Greek into Arabic and Arabic into Latin, under the Abbasid and Cordoba Caliphates, which preserved the classical Greek texts on which it rests, and recirculated them back to Europe. This had important implications for Islamic jurisprudence, which was the progenitor of medieval European jurisprudence and scholastic dialectic. Justinian's recovery of Roman Law and subsequent medieval codifications are related to the impetus for the Islamic translation movement and Islamic jurisprudence at one remove. Why are the Eastern Roman (Byzantine) Empire (which saw a continuation of Hellenic culture), the Islamic empires (which saw a continuation of Hellenistic culture), and the Holy Roman Empire of the Germanic Peoples (which saw the recovery of Roman Law), missing from this account?

KEYWORDS

Straumann; Gibbon; classical republicanism; Pocock; Skinner; Cicero

1. Constitutionalism and grand narratives

To review Benjamin Straumann's *Crisis and Constitutionalism* is a formidable task.¹ A master of the Roman Law tradition in early modern Europe, Straumann presents a grand narrative: *Roman Political Thought from the Fall of the Republic to the Age of Revolution*, with an impressive command of detail. This is, in effect, a study of Roman constitutionalism in the West, from the age of Cicero to the founding fathers of the US. It is nested in the frameworks of contemporary grand narratives, but not in terms of the triumph of ancient virtue, of the standard classical republican tradition told by John Pocock,² which focuses on Plato, Aristotle and Renaissance revivalists, like Machiavelli. But rather in terms of Roman law, as elaborated by Cicero, politician, philosopher and a forensic lawyer, whose works, *De Republica* (*On Commonwealth*), *De Legibus* (*On*

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Laws), and *De Officiis* (*On Duties*), were possibly the most read ancient texts in the West, from the late Middle Ages, through the Renaissance, to the early modern period. They are standard items of the classical humanist curriculum, as Quentin Skinner, in so many of his excellent pieces, has emphasized.³ It is the first premise of contextualism that the basis for any intellectual or legal tradition lies in the continuity of its educational curricula, as well as its public and private practices; and it is the continuity of the Roman Law tradition in the West that Straumann sets out to chart.

Straumann is sensitive to his task and the grand narratives with which he competes, addressing them specifically, first the classical republican tradition as constructed by John Pocock, focused on the Aristotelian tradition of civic virtue arising out of the small city states of Greece, and memorialized in modern political thought by thinkers like Hannah Arendt, with which he disagrees. And second the classical republican tradition as construed by Quentin Skinner, focussed rather on neo-Roman liberties, and the political theory of Machiavelli, which he accepts. Straumann's case is indeed directed at these two versions of the classical republican tradition. But competing grand narratives are like the three Christs of Ypsilanti, they cannot all be right.⁴ Or can they? Grand narratives as a species of *history* face the truth test 'wie es eigentlich gewesen', because to make exclusive truth claims rules out competing narratives. But the *history of political thought* seems to be exempt from this rule. Competing traditions of constitutionalism, in the tradition of Charles McIlwain,⁵ or the classical republican tradition, in either the polis-based version of Pocock, or the Roman-based system of Skinner, are transparently constructions, and do not face the tests of 'wie es eigentlich gewesen' in the strict sense – although those who defend these grand narratives in political theory, in their enthusiasm, often overlook their nature as constructions. More than one narrative can in fact be more or less right, because they are not claiming to report things on the ground as they actually were, but rather as they were perceived. And political theory is nothing if not the art of the perceived. It is that vast arsenal of argumentation on which politicians and historians draw to make sense of motivations, at the micro-level, and institutions, at the macro-level. As compared with history-writing in general, not a lot has been written about the ontology and epistemology of the history of political thought, hence the tendency to submit political theory to the same criteria as historiography in general.

Pocock in the methodological reflections of his magisterial six volume commentary on Gibbon, maintains, in fact, that historiography is the form that political theory originally took. This is plausible when we consider the histories of the ancients, who were much more modest in their truth claims than historians after von Ranke, the first to make the explicit claim 'wie es eigentlich gewesen' (history as it really was). Reinhard Koselleck (1923–2006), in his important contribution on 'History', or 'Geschichte' in the *Geschichtliche Grundbegriffe*, or *History of Basic Concepts*, notes that the German word for history up until the eighteenth century, was 'Historia', borrowing the Greek and Roman term, which in its ancient use did not fundamentally distinguish between history and stories.⁶ And indeed, in its early usage, the modern German term for history, 'Geschichte', from 'Geschehen', 'what has come to pass', could only be used in the plural, indicating an openness to competing stories and, perhaps for this reason, 'Geschichte', very correctly could not be the subject of a sentence. These constraints on its German usage suggested a similar stance to that of the ancients, which Paul Veyne in his *Did the Greeks believe in their*

Myths? nicely illustrated.⁷ It was up to the reader to decide whether when Pausanias, relating the histories garnered from his trips up and down Italy, noted, ‘people say this’, or ‘people say that’, thought they were true, or intended us to take them as true, his very form of presentation suggesting a fair degree of scepticism.

Pocock, in the third volume of his *Gibbon*, gives perhaps the most sophisticated account we have of historiography as a species of political theory, noting that while modern history is evaluated in terms of the sources, and how persuasive it is as an explanation of events taking place on the ground (‘Wie es eigentlich gewesen’), ancient history was a didactic exercise, written by and for the consumption of the political and military classes, to motivate them by heroic example to live up to the founding values of the Republic.⁸ It was not source-based, but drew on the debates of rhetoricians who moralized history; the resources of the past being thought of not as archival, but rhetorical. To the extent that these rhetorical debates were pluralistic, the histories reflecting them could also be pluralistic. In this respect the histories reflected reality, where ‘the republic dissolves into a mere cockpit of political (or post-political) competition by military means’.⁹ The Roman dictator Lucius Cornelius Sulla is a good example. Sulla stood at the cusp of Republic and Empire, and has always been considered Janus-faced, cruel and merciless in the defense of the Republic to the point where he was prepared to march on Rome to save it from its enemies within. He thus prefigured an Empire in which, as Edward Gibbon already diagnosed, one of its frailties lay in Emperors who were no longer necessarily created in Rome, but must march on it in order to be legitimized! But in Sulla we have a figure, who in terms of his own reflexivity, and the self-conscious shaping of his presentation of the self as ‘*felicitas*, or favoured by the gods’, gives us an important account of how he saw his own legitimization.¹⁰ The ancient ambivalence about Sulla is therefore highly symptomatic. The twentieth century experience of catastrophic absolute power, and search for the understanding of its causes, prompted theoreticians like Max Weber, and jurists, political theorists, and activists, like Carl Schmitt, to go back to the Roman Dictatorship, and particularly Sulla, for answers.¹¹

There are some among us who believe that the differences between ancient histories and modern historiography, methodology aside, are not so great, and that the triumphal tales of the grand narrative tradition, including that of the master of the art form, Edward Gibbon, are similarly designed for the makers of empire and political elites. Gibbon’s first volume, let us not forget, was published in 1776, the year of American Independence and of his friend Adam Smith’s *Wealth of Nations*. And although we might paraphrase Mark Twain in declaring rumours of the death of the British Empire to have been greatly exaggerated, and we have no other evidence that Gibbon, or Adam Smith for that matter, thought the end of empire was nigh, Gibbon was, nevertheless, firing a warning shot over the bow. This was a case, in line with Straumann’s analysis, of writers who became sensitized to constitutionalism by threats posed to the *ancien regime*. It was true of Burke’s *Reflections on the French Revolution* (1790) as it was of Montesquieu’s *Spirit of the Laws* (1748). And it is a cautionary tale for the present, when populism, that old bugbear, and right wing fanatics, once again threaten to destabilize the political order established since the last epochal war, WWII.

It is not surprising perhaps, as commentators have long observed, that the most compelling forms of the narrative are produced in times of constitutional crisis. This goes for Machiavelli, Hobbes, Rousseau, Marx and Schmitt. But it also goes for lesser modern

historians, Ronald Syme, and Charles McIlwain, writing under the threat of National Socialism. It is noteworthy that Straumann's own account takes the classic form of this narrative, the threat of tyranny, and the question of where the guarantees of rule of law lie. Is it with the original and irrevocable *translatio* of the power of the people to the prince? Or do the *comitia* of the people retain their right to expression of the sovereign will? Questions being raised again by the constitutional crises engendered by the Trump Presidency, Brexit, and the wave of populism engulfing Germany and Eastern Europe. Our current constitutional crises are frighteningly reminiscent of the crises of Weimar, and the legal responses of Hans Kelsen and Carl Schmitt, fathers of modern jurisprudence, who debated national emergency powers under Article 48 of the Weimar Constitution, invoking the Roman model of the dictator.

It is widely agreed that it was in Germany out of all European countries, that the modern reception of Roman Law was the most complete. Straumann, as a German-Swiss, is in this tradition. When the elaborate confederation of the Holy Roman Empire, tied together by remnants of Roman constitutional government in towns and cities, and home to the great Roman Law revivalists in the universities of Bologna and Padua, founded by the Papacy to train administrators, finally broke down with the conquest of Napoleon, attempts at re-confederation drew once again on Roman constitutional resources. A remarkable group of contemporaneous scholars, jurists, philologists, and historiographers, working together, and sometimes in correspondence, crafted the legal structures of the German Empire which achieved unification only in 1870, while revolutionizing their fields by employing source-based evidence. They included Friedrich Carl von Savigny (1779–1861) the great German jurist and legal scholar who responded to the call of the Anton F.L. Thibaut, professor of Roman law at Heidelberg, for a unified German civil code. Savigny, professor of Roman Law at the University of Berlin (and at the instigation of Wilhelm von Humboldt) from 1810, was a contemporary of Georg Wilhelm Friedrich Hegel, writing in a very different tradition. Interestingly, Leopold von Ranke, professor of history at Berlin from 1825, intervened in the dispute between the followers of Hegel, defending teleological and narrative based history, against followers of Savigny, defending the historical study of positive law, on the side of the latter. But this was hardly surprising, given the stand Savigny had taken against Christian Wolff, author of *Institutiones juris naturae et gentium*, in the venerable natural law tradition, at that time considered outmoded. (It does interest me that Straumann's focus in his treatment of Hugo Grotius, in *Roman Law in the State of Nature*, is very much in the natural law tradition, but between Savigny versus Hegel, I imagine he is on Savigny's side!).

A later generation of Berlin scholars includes the towering (but diminutive) figure, Theodor Mommsen, (1817–1903), classicist and archeologist, historian, jurist, journalist, and, as a member of the Prussian parliament and Bundestag, politician, notable for being a nationalist who nevertheless was outspokenly opposed to Anti-Semitism, believing that the German Reich should incorporate all minorities, by assimilation. Mommsen, a pioneering archeologist and epigrapher, was a master of new techniques for the systematic study of Roman history based on material artifacts, his collection of Roman inscriptions contributed to the Berlin Academy, the *Corpus Inscriptionum Latinarum*, being perhaps his most enduring legacy. His work on Roman law, the *Roman Constitutional Law* (1871–1888) and *Roman Criminal Law* (1899), along with his editions of Justinian's *Digest* (1866–1870), Jordanes' *Origin and Deeds of the Goth* (1882) and the posthumous

Codex Theodosianus (1905), had a lasting impact on the German civil code. But it was Mommsen's three volume *History of Rome* (1854, 1855, and 1856) that had the greatest impact on German historiography, while earning him the Nobel Prize in 1902 as 'the greatest living master of the art of historical writing'. Mommsen, although a master philologist and source-historian, is nevertheless in the ancient tradition of moralistic historians, like Gibbon himself, who saw the resources of the past not as archival, but rhetorical. Egon Friedell (1978–1938), Jewish polymath, cultural historian and cabaretist, declared of Mommsen's *History of Rome*, that in his hands 'Crassus becomes a speculator in the manner of Louis Philippe, the brothers Gracchus are Socialist leaders, and the Gauls are Indians, etc.'¹²

As philologists, historiographers, and jurists, these scholars also began the modern reassessment of the transition from Roman Republic to Empire, which was later taken up by the New Zealanders, Ronald Syme (1903–1989), at Oxford, and Ernst Badian (1925–2011, a student both of L.G. Pocock, John Pocock's father, and Ronald Syme), at Harvard. We see, in this later generation of scholars, how modern historiography and jurisprudence became 'scientific' with the specialization of disciplines like Classics, which deals with a more or less closed universe of texts (and inscriptions). This closure encouraged Classicists, and particularly German Classicists, to be very innovative in using what quantitative data they had to hand, for instance, Friedrich Münzer's (1868–1942) and Matthias Gelzer's (1886–1974) use of prosopography to study the Roman nobility.¹³ The Roman *Fasti* (the lists of consular officials), due to the strict order of names (nomen, cognomen), give us information about family, clan and tribe, that enabled classicists to create social profiles for whole classes of actors for whom they had no individual data. Prosopography in the twentieth century allowed classicists like Ronald Syme (*The Roman Revolution*, 1939) and Ernst Badian (*Foreign Clientelae*, 1958), to show how Roman history was governed not so much by formal rules (i.e. the laws or the constitution) as by informal ones: the laws of power politics and the machinations of patron-client systems. Syme's position, incidentally, is one that Straumann rejects, arguing for a continuity of constitutionalism in the law-based critique of Cicero, even in the bad times during the collapse of the Republic.

It is true that Gelzer, Münzer and Syme's use of prosopography, brilliantly imitated by Sir Lewis Namier in *The Structure of Politics at the Accession of George III* (1929), was an elaborate form of source-based research in the tradition of von Ranke, that imitated the methodologies of the modern social sciences, as practiced by Max Weber and his successors; but at the risk of over-quantification. History as narrative in the tradition of Hegel has its own occupational hazards however: the risks of teleological reasoning, as von Ranke pointed out, and, typically, of triumphalism. This is apparent for instance in McIlwain's *Constitutionalism, Ancient and Modern* (1947). Written, like Syme's *Roman Revolution*, in the shadow of National Socialism, McIlwain emphasizes the long European tradition of rule of law and its transportation to the New World in the form of American constitutionalism. Straumann is in the tradition of McIlwain, as McIlwain, in turn, was in the tradition of Benjamin Constant, writing under the threat of a Jacobin revival of antique models. Constant distinguished the ancients from the moderns in terms of the civic liberty of the Greeks and Romans, and the private liberties of modern Europeans based on the primacy of the right to property, emphasized by Cicero, and the rise of commerce, an historical evolution that it would, in Constant's view, be foolhardy to try to reverse.

Straumann praises Constant (pp. 3–5), while arguing against ‘the overly expansive term [classical republicanism] under which ... the realities of the Greek city-states of Athens, Sparta, and the lesser Greek *poleis* as well as of Rome’, along with their political thought, are subsumed (p. 3).

2. Straumann the advocate

If we are closing the gap between historiography and the history of political thought, what might the implications be for the latter? People have multiple political strategies and much going on in their heads. Is this again the case of history being written by the winners? Or, as Skinner maintains of the Roman idea of liberty, is it sometimes also that of the losers? And what, if anything, has this to do with Straumann’s grand narrative, which is, as I have already noted, a work in political theory, and therefore not bound by the same constraints? (Perhaps we should distinguish between political theory and the history of political thought, which might be bound by the same constraints as history in general). The message I expect us to take from this, is that constructions are constructions, whether they come with the claim ‘wie es eigentlich gewesen’ or not. The fact that some of these grand narratives have fired up highly durable confederations, or empires, while others have been consigned ignominiously to the dustbins of history, is certainly not a substitute for validation. Perhaps history, whether the history of political thought, or facts on the ground, has to be written in this magisterial voice, or no one would take any notice (and in the age of Trump, less and less do!) Perhaps this belongs to the rhetoric of history-writing, about which a great deal less has been written than about the rhetoric of political theorists. Writers of grand narratives are still writing for makers of empire and civil servants, lest we forget! Witness Straumann’s title!

But we are still not sure what this author is claiming when he claims to be giving a history of: *Roman Political Thought from the Fall of the Republic to the Age of Revolution*. Just because constitutionalism appeals to a higher order, the rule of law, among a set of constructions it seems also to be of a different order, and must face the test of *praxis*, constitutional and case law, so cannot be constructed at will! Constitutional and case law are, however, largely missing in Straumann’s account. Daniel Lee makes the case for Roman Law as an idiom, of a similar order to the competing legal idioms Pocock pointed to over fifty years ago in his *Ancient Constitution and the Feudal Law*,¹⁴ in this case a broad church idiom, which is an almost inexhaustible resource.¹⁵ But this is not really Straumann’s stance. To my mind what Straumann is doing is forensic. As a legal historian he is constructing a case, and so he marshals only the evidence which supports it. Straumann’s declamatory tone announces his stance as defendant. So, for instance, his opening statement: ‘Rome, not Athens, has had the deeper impact on Western political history both in the province of the history of events and institutions and in the realm of political and legal ideas’; followed by the elaboration: ‘This extraordinary prominence of Rome in political and legal thought remained until at least the rehabilitation of democracy, including Athenian democracy, in the nineteenth century’.¹⁶ As a truth claim this is impossibly broad, and I am daring to set out here to qualify it. But as an opening gambit for the defence it is impressive, allowing him to skip over centuries, possibly millennia, and over great swathes of territory belonging to the late Roman Empire and its cultures. Quite properly for a defence lawyer, he incorporates where possible evidence from the

other side, but not as an acknowledgment of alternative narratives, but rather of the veracity of his own defence. Of course, as a lawyer mounting a case, he has to acknowledge that it is contestable, and that he might not win! But this acknowledgment is a concession that does not belong to forensic rhetoric, and for this reason, perhaps, Straumann argues such a strong line, that it appears to admit no alternatives. Quentin Skinner has already emphasized the power of forensic rhetoric in Shakespeare, as a demonstration of the humanist tradition.¹⁷ But insufficient attention has been paid to the forensic rhetoric of historians and historiographers of political thought. I am taking Benjamin Straumann's case to try to make a beginning. So, in the role of cross-examiner, I put to him the following questions:

- (1) Is this just another history of Western triumphalism, however well executed, in which Straumann is simply replacing one favoured edifice (Greek democracy) with another (Roman Constitutionalism)?
- (2) Is there real evidence for the reflexivity and self-consciousness of Roman constitutionalism that he claims? In the case of Cicero, for example, or Sallust?
- (3) Why are the Eastern Roman Empire, which saw a continuation of Hellenic culture, and the Islamic empires, which saw a continuation of Hellenistic (Graeco-Roman) culture, along with the Holy Roman Empire of the Germanic Peoples, which revived Roman Law, missing from this account?
- (4) What does the shift with Justinian (which he does not treat) represent? Does Justinian's refusal to allow further interpretation of Roman Law, once the codifiers had completed their task, and his closure of the Greek Academy in 529AD, to forestall debate, not suggest a high degree of reflexivity and awareness of the fragility of his construction?
- (5) What room is there for alternative grand narratives? Straumann's dichotomy between the Greek ethical and political tradition of Plato and Aristotle, which emphasizes civic virtue, and the Roman-law based constitutionalism of Cicero, is too easy. The two come together in a complex way. The very survival of Western civilization depended on translation movements, Greek into Arabic and Arabic into Latin, under the Abbasid and Cordoba Caliphates, which preserved the texts on which it rests, and recirculated them back to Europe. This had important implications for Islamic jurisprudence which was the progenitor of medieval European jurisprudence and scholastic dialectic. Justinian's recovery of Roman Law is related to the impetus for the Islamic translation movement at one remove.

Not all of these questions can be addressed here, so I omit discussion of question 2). Questions 3), and 5) concern Straumann's failure to consider the Eastern Roman (Byzantine) Empire, or its successor states in the Islamic Empires as belonging to the history of the Roman Empire that he charts. In the case of the Byzantine Empire, as I discuss below, he follows Gibbon, whose bleak assessment of its history led him to believe that it was hardly worthy of his attention. In the case of the Islamic Empires, which could fairly be held best to represent the continuity of ancient Greek thought in that long period that he largely omits, the Holy Roman Empire, this has important implications for his thesis that 'Rome, not Athens, has had the deeper impact on Western political history both in the province of the history of events and institutions and in the realm of political and legal ideas'. Although, when it comes to my critique, Straumann may consider himself

unfairly done by in the case of the Islamic Empires, a little historical investigation shows that indeed the impact of Athens on the West is prior to that of the Cicero's Rome in every sense. As I wrote in an essay published over 30 years ago:

the long tradition of mythologizing the *polis*, otherwise known as 'the classical republican tradition', has two great achievements to its credit. The first is to claim for the great landed monarchies of Europe the heritage of the city-republics of classical Greece as their very own. The second is the distancing of Western regimes from those of the East, by 'Orientalizing' them and stereotyping them as monarchical or 'despotic' and 'other'.¹⁸

I go on to argue: 'This latter achievement is all the greater for the fact that recent scholarship in Assyriology, and even some classical scholars, now acknowledge that *polis* society was found in Mesopotamia long before Greece, creating traditions from which the classical *polis* may well have derived.' 'The net result of "classical republicanism"', I conclude 'is thus an extraordinary historical inversion, which renders monarchical regimes "essentially" democratic and Eastern regimes "essentially" despotic'.

It is a judgment I still stand by. Not only are the Mesopotamian law codes, of which the Hammurabi Code is the most famous, ancestors of the Roman tradition of constitutionalism that Straumann narrates, numerous scholars commenting on the similarity between them and Roman Law as we know it. But the continuity of Roman law depended very much upon the law schools of the Eastern Roman Empire, and in particular the Beirut school of law, where Ulpian (Gnaeus Domitius Annianus Ulpianus, c. AD 170–223), from a Phoenician Tyre-based family, and one of the five jurists upon whom decisions were to be based according to the Law of Citations of Valentinian III, was probably a professor. Already under the Principate and the late Republic legal practices differed considerably between the Western and Eastern Roman provinces. Early Roman lawyers had been 'state priests' recruited from the patrician class. But the shift from 'an aristocratic Republic to an absolute military monarchy', had important consequences for legal practices.¹⁹ 'Pontifical jurisprudence, so long a secret science, was published to the world about the year 254 B.C. by Tiberius Coruncanius, the earliest plebeian pontiff, who first avowed himself a public jurisconsult'.²⁰ From the moment that law shifted from the priestly into the public domain, 'commentary on the Twelve Tables and the pontifical proceedings for actions and juristic acts' was the basic form it took; and from very early the profession was divided between rival schools of commentators, the Sabinians and Proculians, which sprang up under Augustus and lasted as long as Emperor Marcus Aurelius (Sherman, 501). Commentators already credit the Eastern influence of the scientific methods of Stoic philosophy in 'shaping law into a rational artistic form'. Cato the younger (d. 152 BC) was the first to attempt to systematize the heterogeneous elements of the law, a task fully accomplished only in 100 BC by Scaevola the younger, whose systematic arrangement and classification of positive law according to subject matter (wills, legacies, guardianship, contracts such as sale, etc.) became the foundation for future jurists (Sherman, 500). The institutional development of Roman Law, far from being written constitutional law of the modern type, early exhibited the heterogeneous combination of Institutes (*Institutiones*) of instructors and Digests of commentators plus the judgments of practitioners that were to characterize it into the medieval period.²¹

At the same time legal practices in the Western and Eastern Empires became differentiated. In the second century BC already, Rome came to depend for advocates on forensic

orators, a new class of privately paid legal practitioners who met the demand for more advocates driven by increasing activity in the *comitia*: 'known at first as *oratores* and later as *advocati*, and, during the Imperial period, as *causidici*, *togati* or *patroni*' (Chroust, p. 564), these *homines novi* came from all strata of Roman and Italian society, and were trained in rhetoric but often unscrupulous and notoriously ignorant of the law. Among them were nevertheless men of great eminence like Seneca, Tacitus, and Pliny the younger. With the irrevocable break between the Western and Eastern empires in AD 395, Chroust argues (p. 524), 'the West no longer kept up with the many and significant developments which in the course of the fifth and sixth centuries A.D. made the East-Roman legal profession truly progressive'. By the fourth century AD aspiring advocates in the East 'no longer attended schools of general rhetoric', as they did in the West, but rather enrolled for up to five years in 'regular law schools' to satisfy the requirement of the East-Roman Emperor Leo I (AD 457–74), whose decree of 460 required advocates to be certified by examination (Chroust, p. 572). From the fourth century on we see increasing imperial control on the part of the Eastern emperors, due to 'serious overcrowding of the legal profession, especially in the capital, Constantinople', to regulate the numbers admitted to law school, and advocates admitted to plead before the praetorian courts in Alexandria, Constantinople (by Leo I, 457–74 AD), the prefectures of Illyria (by Emperor Zeno, 474–91) and Syria (by Emperor Anastasius, 491–518) (Chroust, 577–8).

The 'state law school' was famously introduced by Diocletian (284–305AD) and extended first to the law schools of Rome and Berytus (Beirut), already operating, and only later to the law schools of Constantinople, Alexandria and Caesarea (Sherman, 503). The edict of Theodosius the younger, who established a university at Constantinople in 425 AD, with 3 professors of rhetoric, 5 sophists and 10 grammarians, as well as 2 professorships in law, stipulates the comportment expected of professors and students alike (Sherman, 504). And many edicts and official records attest to the organization of the profession and its 'schools' and 'colleges'. 'Lawyers admitted to the same court formed a sort of "bar association" called *schola* (school) and, hence, were referred to as *scholastici*', Chroust notes (578).

These 'schools' or 'colleges of advocates' (*collegium togatorum*), supervised, among other things, the professional conduct of their members ... presided over by a *primas*, a sort of 'president of the local bar association,' who also held the paid office of an *advocatus fisci*, or 'attorney of the crown' ... Each *schola* had certain corporate rights, and every member enjoyed a number of privileges and exemptions from certain public duties which were secured by law. (Chroust, p. 578–9)

The Law School of Beirut, 'of which Ulpian was probably a professor' (Sherman, 503), deserves special mention: 'called by Libanius "the mother of all laws," by Nonnus "the City of Laws," and by Emperor Justinian "the midwife of all laws"', it was 'destined to become the most famous law school in the Roman world' (Chroust, 600, citing Collinet, 51–64). Dorotheus and Anatolius, both professors of the Beirut law school, were especially praised by Justinian for their wisdom and summoned by him to assist his minister Tribonian in compiling his Codex, the Empire's body of civil laws issued between AD 529 and 534. The prologue to Justinian's completed *Omnem* constitution of 533 (*Digest*, 35) read:

These three works which we have composed we desire should be put in their hands in royal cities as well as in the most fair city of Berytus, which may well be styled the nursing mother of law, as indeed previous Emperors have commanded, but in no other places which did not enjoy the same privilege in old times, as we have heard that even in the brilliant city of Alexandria, and in Caesarea and others, there have been ignorant men who, instead of doing their duty, conveyed spurious lessons to their pupils, and such as these we desire to make desist from that attempt by laying down the above limits, so that, if they should hereafter be guilty of such conduct and carry on their duties outside the royal cities and the metropolis Berytus, they may be punished by a fine of ten pounds of gold and be expelled from the city in which instead of teaching the law they transgress the law.

Just as a number of ancient historians had been law students in Rome – Seneca, Tacitus, and Pliny the younger among them – so the Beirut School also had famous historians and administrators as alumni. Eusebius of Caesarea, bishop of Caesarea Maritima about 314 AD, ecclesiastical historian and counselor to Constantine the Great, records in his *On the Life of Pamphilus* that Pamphilus of Caesarea was born into a rich family in Beirut in the latter half of the third century and attended its law school. Pamphilus, who is celebrated as a martyr by both the Roman Catholic and the Eastern Orthodox Churches, later became the presbyter of Caesarea Maritima and the founder of its extensive Christian library. Eunapius wrote of Anatolius, a high-ranking Roman official trained at the law school in Beirut, who occupied the offices of consul of Syria, vicarius of the Diocese of Asia, proconsul of Constantinople, urban prefect of Constantinople in 354, and Praetorian prefect of Illyricum until his death in 360, that: ‘He reached the summit of the science of law. Nothing about this is surprising because Beirut, his homeland, is the mother and nurse of these studies’.²² Similarly, Libanius’ correspondence with Gaianus of Tyre discusses the latter’s achievements after his graduation from the law school of Beirut; to become the consular governor of Phoenicia in 362. Gazan lawyer and church historian Sozomen, also a law student at Beirut, wrote in his *Historia Ecclesiastica* about Triphyllius, a convert to Christendom who became the bishop of Nicosia, that Triphyllius received legal training in Beirut and was criticized by his teacher Saint Spyridon for his atticism and for using legal vocabulary instead of that of the Bible.

It is noteworthy that Edward Gibbon although scorning ‘Byzantium’, nevertheless treated its ecclesiastical historians with respect, and seems to have intuited that their legal training, especially in the case of Eusebius, the greatest of them, made them too politically involved to be good historians, declaring: ‘The gravest of the ecclesiastical historians, Eusebius himself, indirectly confesses, that he has related whatever might redound to the glory, and that he has suppressed all that could tend to the disgrace, of religion’;²³ Gibbon goes on to claim:

Such an acknowledgment will naturally excite a suspicion that a writer who has so openly violated one of the fundamental laws of history has not paid a very strict regard to the observance of the other; and the suspicion will derive additional credit from the character of Eusebius, which was less tinctured with credulity, and more practised in the arts of courts, than that of almost any of his contemporaries.

For the history of the continuity of Roman law in the Eastern Empire, Gibbon’s disparagement once again cast a long shadow. And yet the hiatus was in the West. The influence of Justinian’s Codex on Western law, including that of the Americas, dates only from 1070, when the one surviving complete copy of the *Digest* in Italy was rediscovered, beginning

properly in 1088, when Irnerius, jurist and professor at the newly founded University of Bologna, was the first to teach it.²⁴ Justinian's refusal to allow further interpretation of Roman Law in the Eastern Empire, once the codifiers had completed their task, and his closure of the Greek Academy in 529 AD to forestall debate, which suggest a high degree of reflexivity and awareness of the fragility of his construction, certainly contributed. But his ban on commentators did not last into the Holy Roman Empire where his Codex was precisely taught by means of glosses or explanatory notes, written as marginalia or between the lines, hence the term 'glossators'. In this form the medieval revival of Roman law spread to the universities and law courts of Europe, first France, the Netherlands, and finally Germany, where the enactment of the German Civil Code in 1900 put an end to the application of forms of law derived from the Justinian codes in Western Europe. But in the Eastern Roman Empire, during the hiatus of half a millennium in Western Europe, the influence of the *Corpus Juris Civilis* was continuous, remaining the basis of Byzantine law until the publication of the *Ecloga legum*, an abridged version, in 741 by Emperor Leo III and his son and co-regent Constantine V. Written in Greek, because Latin had fallen into disuse, it continued in use in the Balkans and Asia Minor for centuries, with surviving translations in Slavic, Armenian and Arabic.²⁵ Legal compilations invalidating parts of the *Ecloga* and restoring Justinian original laws, were introduced by the ninth century Emperor Basil I,²⁶ whose *Prochiron* served as the basis for the legal writings of the twelfth-century first archbishop of Serbia, Saint Sava; a legal compilation intended for the Serbian church but finally adopted as the basic constitution for the Bulgarian and Russian orthodox churches.²⁷ Around 900, Emperor Leo VI commissioned the *Basilica*, a Greek rewriting of Justinian's laws that served as the ancestor of modern Greece's law until the enactment of the Code of 1940.²⁸

3. Translation and antiquity transformation

Developments in legal practice in the Eastern Roman Empire show remarkable continuity with the Holy Roman Empire, more commonly known as the Middle Ages, and largely shadowy in Straumann's account. But just as important for my interrogation of Straumann are the Greek into Arabic and Arabic into Latin translation movements and their legacy in Islamic jurisprudence, to which we owe the impetus to recover the constitutional legacy of Justinian, and the institutions and methodologies by which it was incorporated into the Western legal tradition. The material on the Eastern Roman Empire has long been available. But even in the 1980s when I wrote my essays on the legacy of the ancient Greek polis in the Islamic states, most of the material now available for understanding the impact of the translation movements under the Arab Caliphates on Islamic jurisprudence, and further, on Western medieval institutions and practices, was as yet unpublished.

If Byzantium is a gaping black hole in histories of constitutionalism, even as sophisticated as Straumann's, and the Holy Roman Empire is not even listed in his index, Islamic jurisprudence is entirely missing. How could a history of Roman constitutionalism that purports to run from Cicero and the late Roman Republic to the constitutionalism of the French Republic and the United States of America simply ignore such large swathes of its history? From the seventh to the eleventh centuries AD the Eastern Mediterranean was the theatre of constant wars between the Byzantines and Arabs, fighting for control of the Eastern Roman Empire. And during this period, the Umayyad and Abbasid Caliphates

accomplished an antiquity transformation that goes unmentioned in Straumann's account, even though the continuity of Western civilization depends on it. Straumann treats the ancient Greek tradition of Platonic and Aristotelian ethics and politics as separate from the Roman civil law tradition of Cicero, even though he was profoundly influenced by Aristotle, and a citizen of Rome which more or less turned the philosophy of ethics and politics over to the Greeks. The resurrection of Greek philosophy, transmogrified by Scholasticism in the West, where the Greek language had slowly died, was first effected not by a Quattrocento Renaissance centred in Florence, Venice and Rome, but by an Islamic Enlightenment from the eighth to the twelfth centuries centred in Baghdad, and later Cordoba and Toledo, which recovered and preserved thousands of Greek philosophical, mathematical, astronomical, astrological and scientific texts which would otherwise have been lost. Although legal texts were not part of this cache, Aristotle's *Organon*, his logical works comprising: the *Categories*, *On Interpretation*, the *Prior Analytics*, the *Posterior Analytics*, *Topics*, *On Sophistical Refutations*, to which the *Rhetoric* was also related, were texts essential to the development of Islamic jurisprudence which, in turn, played an important role in the development of medieval scholastic dialectic; was very likely a motivation for the medieval recovery of Roman Law; and some have argued, a model for the English Inns of Court.

We have Gibbon to thank for the fact that to this day we refer to the Eastern Roman Empire as Byzantine, the name in itself apparent grounds for its exclusion from mainstream history! Gibbon, whose Greek was not as good as his Latin, and who was not a philologist or an archives-based historian but the producer of grand narratives, harboured personal contempt for the Byzantine Empire:

Byzantine history was to him 'a tedious and uniform tale of weakness and misery. On the throne, in the camp, in the schools, we search, perhaps with fruitless diligence, the names and characters that deserve to be rescued from oblivion',

and he therefore felt vindicated, in chapter 48, 'historically speaking, the weakest section of the whole work ... in rac[ing] through five centuries of Byzantine history'.²⁹ (It is noteworthy that Pocock's huge commentary on Gibbon ends with the fall of the Western Empire, and does not treat the Eastern or Ottoman Empires, either, on the grounds that Gibbon's history of the Eastern Empire was a much less coherent project than his history of the West, requiring different languages and the examination of different archives and sources).

By contrast, Gibbon's treatment of Islam is brief but relatively sympathetic. A modern scholar of Islam notes that

Gibbon long ago insisted that there had been more than one road out of Antiquity, leading not just to the formation of Latin Christendom – the Papacy, German Empire and Italian Renaissance – but also to Greek Christendom and the rise of Islam;

and that 'by examining the origins and expansion of Islam in the context of the decline and fall of the Roman Empire, Gibbon raised the question whether Christendom – Latin, Greek and Oriental – can be regarded as the sole legatee of Antiquity'.³⁰ 'Few individual historians before or since Gibbon have felt confident to tell the story of both Romes (Old and New), the Umayyad and Abbasid Caliphates, and the Seljuks, Mongols and Ottomans', he concedes, '[y]et only by addressing all these polities, and the peoples who

constituted them, is it possible to write the history of Eurasia so as to do justice to Asian as well as European perspectives'. Fowden gives as reasons for Gibbon's openness to the Islamic empires as 'legatee of Antiquity', the fact that: 'Not only Voltaire but also the *Universal History* (London, 1736–66) encouraged Gibbon to look beyond Europe and its Christian narrative, while attitudes to Islam had softened in the decades around 1700', reporting a comment from Philip, second Earl of Hardwicke, to Gibbon, 20 Sept. 1781:

As I have perused your History of the Decline, &c. with the greatest pleasure and instruction, I cannot help wishing that ... you would gratify your numerous readers and admirers, by continuing it, at least till the irruption of the Arabs after Mahomet. From that period the History of the East is not very interesting, and often disgusting.

Fowden notes however that 'this aspect of *Decline and Fall* remains unappreciated, especially in John Pocock's monumental *Barbarism and Religion*'.³¹

The extraordinarily lopsided history of *Decline and Fall*, for which Gibbon himself is responsible, produces an entirely misleading account, if not indeed a fabrication. *Decline and Fall*, might be true of the West, but it was not true of the East, which saw an extraordinary flourishing of antique culture. While *Hellenic* culture continued in the Eastern Roman Empire, now known as Byzantium – all facility in Greek having died out in the West by AD 1000 – the Islamic world saw the perpetuation of *Hellenistic* (i.e. Graeco-Roman culture), by Byzantines, Persians, Syriac Christians, Nestorian Christians, Greek Orthodox Christians, Christian Copts, Moslem Arabs and Jews. That such a great tranche of cultures on the perimeters of the Mediterranean, and many of them Semites, could be banished from the history of the later Roman Empire and its successor empires, is nothing short of alarming! Moreover, it is precisely to these peoples and their scholars that we owe the preservation and translation of the great texts of Greek philosophy, mathematics, science, astrology, on which the triumph of western civilization is based. Without them we would have no Aristotle, no Plato, no Euclid, no Ptolemy and no Galen! The state of eighteenth century scholarship was such that Gibbon would not be aware of the scale of the antiquity transformation, as I term it, brought about by the Greek into Arabic, Arabic into Latin translation movements under the Umayyad, Abbasid and Cordoba Caliphates. (What were the holders of the chairs of Arabic, founded at Oxford and Cambridge in the seventeenth century, doing all these years!) But modern historians do not have the same excuse.

Nor was Gibbon probably in a position to assess Islamic sedentary culture, so brilliantly analysed by the great fourteenth century Maliki judge, Ibn Khaldun (born 1332 in Tunis, died 1406 in Cairo), whose *Muqaddimah*, or Prolegomena, influenced seventeenth-century Ottoman historians like Kâtip Çelebi, Ahmed Cevdet Pasha and Mustafa Naima in their analysis of the growth and decline of the Ottoman Empire, but was generally unknown in Europe until the nineteenth-century.³² The first European biography of Ibn Khaldun was as early as Barthelémy d'Herbelot's *Bibliothèque orientale* (1697), brief and unreliable, and Pocock, in the first of two essays on Ibn Khaldun in press with this journal, 'The Desert and the City: reading the history of civilization in Ibn Khaldun after Edward Gibbon', and 'Rational Enthusiasm and Angelicality: the concept of prophecy in Gibbon and Ibn Khaldun', notes that d'Herbelot's *Bibliothèque* 'guided Gibbon's "oriental" learning'.³³ The *Muqaddimah* became widely known only

in the twentieth century, with the remarkable pioneering Arabic scholars of the University of Berlin, and especially Franz Rosenthal, who produced the most widely used translation of the *Muqadamah*.³⁴ The story Ibn Khaldun tells of the assimilation of conquering Islamic tribes to the sophisticated cultures of the Fertile Crescent and East Mediterranean littoral cities, compares starkly with the devastation and barbarization of the Western Empire, such that even the great Charlemagne is believed to have been illiterate, his office work handled by Alcuin of York (c. 735–804 AD), who at Charlemagne's invitation, became a leading scholar and teacher at the Carolingian court in the 780s and '90s. Byzantium had become increasingly closed, after the Emperor Justinian shut down the Athenian Academy in 529AD, upon which philosophers who had taught there left for Persia. We have evidence that some Greek into Arabic translation took place under the Umayyad Caliphate (661–750 AD) centred in Damascus already. But the Umayyad ruled over a Greek-speaking population, they used Byzantine administrators, including descendants of the Byzantine *foederati*, and they had, by and large, no need of translations because they could read the Greek texts to which they had access. However, Byzantine exclusionary practices and Orthodox Christian high culture were hostile to Hellenic culture, and Dmitri Gutas, Rosenthal's student at Yale, whose command of Greek, Arabic, Syriac, Pahlavi, Persian, and Turkish, like that of his teacher, uniquely qualifies him for the philological and archival work that study of the Greek into Arabic translation movement demands, notes the relative failure of the translation efforts of Boethius and Sergius of Damascus.³⁵

With the foundation of Baghdad by the Abbasid Caliphate in AD 762, we have a very different story. Located in the heart of Mesopotamia and a Persian (Pahlavi – speaking) population, it set in train a sequence of events that constituted antiquity transformation on a grand scale. A translation machine was set up as a well-calculated legitimization strategy to recover the ancient Persian wisdom so revered by a formerly Sassanian population, and largely destroyed by Alexander the Great with the conquest of Persia and the burning of the royal library at Persepolis. A remarkable cross section of society, including Syriac-speakers, Nestorian Christians, orthodox Christians, and Jewish scholars, participated, in this translation movement, and over two centuries thousands of scientific, philosophical and medical texts, notably by Aristotle, Ptolemy, Galen, and Euclid and others were translated, sometimes many times over, so that the Leipzig Galen of 1821–33 comprised some 122 treatises in 20 volumes, while the Berlin Reimer Aristotle Commentaries (1882–1909) ran to many volumes. This extraordinary set of contingencies involving conquest and destruction, first by Persia of Greece, and then Greece of Persia, produced translation machines, Greek into Arabic, under the Abbasid Caliphate, and later Arabic into Latin in Spain and Sicily, under the Caliphate in Cordoba. To them, along with centuries of Arabic commentary that fed the four schools of Islamic jurisprudence, Hanifi, Maliki, Shaf'i and Hanabali, we largely owe the rise of Arabic science in the East and the survival of Greek philosophy and science in the West.

To understand how this extraordinary sequence of events, and one of the only known examples of the *translatio studii*, so revered by the Renaissance, took place we need to review its history in a little more detail. The foundation of Baghdad by the Abbasids in AD 762 shifted the Caliphate from a Greek-speaking population under the Umayyad Caliphate (661 to 750 AD) in Damascus to a predominantly Persian speaking population in

the heart of Mesopotamia, belonging previously to the Sasanian Empire. The Persian population of the Abbasid Caliphate centred in Baghdad was now more diverse than the largely Greek population under the Umayyads, comprising Christian and Jewish minorities as well as Muslims, and the Abbasid revolution had succeeded largely due to cooptation of the Sasanian Persian elite. Perceived as more Persian than Arab, the Abbasid Caliphate then had to deal with minorities that were hostile to this shift, which involved dynastic complications and score-settling. Greek learning had already been thoroughly assimilated by Syriac speakers, Syriac traditions differed from those of the Chalcedonian, Monophysite and Nestorian communities, also preserving Greek culture and pre-Islamic Hellenic traditions. It was these communities that provided an immediate source of Greek translators (Gutas, 14–16). Under the Abbasids, unlike its predecessor Caliphate, the Umayyads, anti-Hellenic Orthodox Christianity played very little role. Moreover, Indian scientific materials, especially astronomy, and the imperial ideology of the Zoroastrians had already been transmitted through Pahlavi, the Middle Persian of the Sasanians, the Zoroastrians showing an interest in Aristotle's physics, for instance (Gutas, 25–26). So Persian into Arabic under the Abbasids, followed the same pattern as Greek into Arabic under the Umayyad, a case of practicalities in the aftermath of conquest, but on a much larger scale.

Gutas is emphatic that the Abbasid translation movement was politically driven, motivated by appeasement of the supporters of the Abbasid revolution, particularly the Persian faction, heirs to imperial culture since the Babylonians and through the Sasanian Empire (Gutas, 28–9). Al Mansur, the second Abbasid Caliph and founder of the translation movement, was focused on Sasanian culture, political astrology and Zoroastrian imperial culture, including accounts of the Persian transmission of knowledge from earliest times (Gutas, 35). The prehistory of his project was Alexander the Great's destruction of Zoroastrian learning and its recovery, having passed into Egyptian hands from Alexander's Greek translations and those of the Copts (Gutas, 36–40). Gutas talks about the wide dispersal of texts, to India, Byzantium, and even China, and the self-consciousness of Syriac (Aramaic) speakers as being descendants of the Babylonians (Gutas, 41–3). As befitting the propaganda, all Greek texts were seen as having been pillaged from the Persians, and this perception drove the culture of translation (Gutas, 44–5). Astrology was particularly important in legitimizing the Abbasid Caliphate, as a political ideology claiming to be the storehouse of the ancient wisdom of the Babylonians and Persians. There was also another angle to it. Although the Abbasid revolution had been prepared among a mainly Persian population, it had met the resistance of landowners and national-revivalist Zoroastrians. Translation was therefore also the answer to preserving a dying language, Pahlavi, as well as being a recruitment tool to bring minorities on board (Gutas, 46). The Abbasid capital of Hurasan, Marw, an ancient seat of learning, had been the centre of revivalist Zoroastrianism, and was carefully chosen as the headquarters of the translation movement and its 'House of Wisdom', or Royal library, in line with al-Mansur's policy decision to coopt Zoroastrianism and transfer it to Baghdad (Gutas, 50). Until the fall of the Abbasid regime after the sack of the Mongols, Marw was famous as a centre for scholarship and for its libraries. Significantly, the earliest Arabic translations were not from Greek, but from Pahlavi and they were of predominantly astrological texts, some dating from Mesopotamian civilization.

4. Antiquity transformation and Islamic jurisprudence

The Greek into Arabic translation movement under the Abbasids lasted two centuries, from the eighth century to the tenth centuries AD. It was followed by the period of the great Islamic commentators from the tenth to the twelfth centuries AD: Al-Kindi, c. 801–873 from the Baghdad House of Wisdom, a major translator of Aristotle to Arabic; Al-Farabi, c. 872–950, a peripatetic Aristotelian and Neoplatonist, who moved between Baghdad, Aleppo and Cairo; Avicenna (Ibn Sina) 981–1037, the Persia Aristotelian, born in Bukhara, died in Hamadān; Avempace (Ibn Bājjah) 1095–1138, the Andalusian polymath, born in Zaragoza and died in Fez; and Averroes (Ibn Rushd) 1126–1198, the Aristotelian from Cordoba, who died in Marrakech. It is remarkable, as modern scholars concur, that these commentators took up the central epistemological, ontological and scientific questions of the Greek philosophers of antiquity, and succeeded in treating them in a thoroughly Hellenic way. It is undoubtedly due to the plethora of philosophy schools scattered around the Levant, and the belief of the commentators as well as of the translators, that Greek philosophy was indeed the ancient Mesopotamian and Persian wisdom, and not a monopoly of the Greeks. It was indeed the case that the Islamic state was the continuation of the Hellenistic state, and many of the philosophers who influenced them were Hellenistic philosophers and Alexandrian based – Plotinus of course, and the Neoplatonists, as well as Stoics, Sceptics and Epicureans.

There was not a field of philosophy or science that the Arab translators and commentators did not touch. It is true of questions debated between Plato, Aristotle and Plotinus on ‘the one and the many’ for instance, and the questions of the Epicureans on ‘atoms and the void’; even ‘squaring the circle’, which has a very Hobbesian ring to it. From all accounts Aquinas knew Aristotle only through Averroes, but because Averroes so faithfully represented Aristotle, and across his whole corpus, Aquinas did not need to know more. (Aquinas had been recruited to Federico II’s new university in Naples where, under the patronage of this Holy Roman Emperor, the Arabic commentaries were curated.) As Islamic science progressed there was demand for more and more accurate translations, which is why when the Royal Society of Sciences in Göttingen called in 1930 ‘for a collection of references to Syriac, Arabic, Armenian and Persian translations of Greek authors’ (Gutas, xiii), the Leipzig edition of Galen alone, published 1821–30, ran to 20 large volumes, while the Berlin Reimer edition of Aristotle Commentaries (1882–1909) ran to many volumes. The translation movement ended when scholars began writing ‘explicitly critical books with titles like Rhazes’ “Doubts about Galen”, Ibn al-Haytam’s “Doubts about Ptolemy” ... [and] Avicenna’s *Eastern Philosophy* ... which, for all practical purposes, could have been called “Doubts about Aristotle”,³⁶ indicating that they believed Islamic science had already outstripped Greek. Meanwhile the Caliphate had moved to Cordoba, and a new translation machine was set up in Toledo, this time to translate the Arabic translations and commentaries into Latin. And then the circle was indeed squared and Greek science was recirculated back to Western Europe!

Those works of Aristotle’s *Organon*, which had been translated and retranslated, commented and recommended upon most, were his logical works comprising: the *Categories*, *On Interpretation*, the *Prior Analytics*, the *Posterior Analytics*, *Topics*, *On Sophistical Refutations*, and the *Rhetoric*; works that did not reach Western Europe until the twelfth century, but on the basis of which, by the ninth century, Islamic dialectic,

Jadal, was already well established. Not coincidentally, they were texts, as already noted, essential to the development of Islamic jurisprudence, and the science of forensics, on how to build and defend a case. As George Makdisi, in one of his foundational essays on Islamic jurisprudence and the development of medieval dialectic, has noted, Islam, which was not a church, and in the absence of councils or synods, depended on consensus, *ijma*, to define orthodoxy, which was handed over to the jurists. 'Since there was no formal organization of *ijma*, the process worked retroactively', each successive generation

cast[ing] its glance backward to the generations that preceded it to see whether or not a certain doctrine had gained acceptance through consensus; and this was decided by the absence of a dissenting voice among the doctors of the law.³⁷

'Differences of opinion were compiled in large tomes, and *khilaf*, became an important field of knowledge taught in the schools of law'. As Makdisi notes, by the tenth century *disputatio* was already taught, and in the eleventh, these elements were brought together in the works of the jurisconsult Ibn 'Aquil (Baghdad, 1040 to 1119), whose 'shorter dialectic' exhibits 'the scholastic method itself in full bloom', and whose longer work on dialectic was especially written for lawyers (Makdisi, 650–51). The structure of scholastic disputation is distinctive, and exemplified by Thomas Aquinas, educated at Naples in the Arabic commentaries: 'the *Summa* ... is divided into Parts (*pars*), each Part is divided into Questions (*quaestio*) and each Question into Articles, the article (*articulus*) being stated in interrogative form' (Makdisi 651). Ibn 'Aquil, who like Aquinas was a professor, concluded his three volume *Summa* with his declaration of intent:

In writing this work I followed a method whereby first I presented in logical order the theses, then the arguments, then the objections, then the replies to the objections, then the pseudo-arguments (of the opponents for the counter-theses), then the replies (in rebuttal of these pseudo-arguments) – (all of this) *for the purposes of teaching beginners the method of disputation*.

Makdisi notes the special circumstances of Ibn 'Aquil, from a Baghdadi Hanafite family (the most traditionalist of Islam's legal schools), who nevertheless 'grew up with rationalist *Mu'tazilism* as part of his familiar surroundings', and tried to reconcile them (Makdisi, 656–7). Of the *sic-et-non* method of disputation which Ibn 'Aquil exemplifies, Makdisi notes:

The *sic-et-non* method, dialectic and disputation are not the only elements that are found in Islam before their appearance in the West. Noteworthy are the following parallel elements: the Latin *relationes* or *reportationes* and the Islamic *ta'liqa*, notes of professorial lectures that developed into the textbooks of the day, several of which have survived; the Latin *pecia*, or piece of a book, and the Islamic *juz'*, is also a constituent part of a book, both of which served the needs for reproducing the work before the advent of printing; the European college, like the Collège des Dix-Huit in Paris, and the Muslim *khan*, in Baghdad, both of which served as boarding houses for students, and where instruction later took place, the Muslim *khan* becoming incorporated into the *madrassa*, and the European college becoming a university.³⁸

These Islamic institutions were not lacking channels by which to travel from East to West via Byzantium, Italy, Sicily and Spain, and in his enquiry into the origins of the English Inns of Court, and the corporate structure of colleges, Makdisi also notes the role of

returning crusaders, who had observed Muslim practices and institutions in Jerusalem. Law, like most Islamic learning, typically took place in the Mosque, which began life as the city square or Agora but, as Oleg Grabar, the great historian of Islamic architecture tells us, under pressure of competition from the Jewish synagogue and the Christian church, gradually became transformed from an outdoor space, to an indoor space, hence the columns, which were relics of the colonnaded shop fronts, and the fountain, that would have been a feature of the city square.³⁹ Mosques, as community centres (the name *Jamia*, mosque, means community centre), usually had a *khan* or inn attached, and Makdisi records one particularly generous philanthropist founding 3000 mosque-inn complexes over a 30-year period.⁴⁰ The mosque-inn complex was typically to be found in cities which had no *madrastas*, for the *madrassa* was a further development in which mosque and inn were combined in a single foundation; but there were no *madrastas* in Jerusalem, or Palestine in general, Spain or Sicily.

Just as there were mosque-inn complexes in the East, so in the West we find, particularly in the period relevant to the Crusades, the development of church-inns, and later Inns of Court. In London, under King Stephen (1135–54) and his successor, Henry II (1154–89), before the founding of the three earliest Oxford Colleges, University College, Balliol and Merton, in the thirteenth century, there were three famous schools attached to churches, that were used for teaching law: one attached to St. Paul's in Paternoster Row; St. George's Inn attached to St. Sepulchre's; and Thavies' Inn attached to St. Andrews. Makdisi records William Fitzstephen (d. 1190) churchman and lawyer, recounting of

the masters of law, who met 'in the church with their "scholars" [the medieval English term for undergraduates] and where they held disputations The principal meeting place of the lawyers with their clients was in the parvis or porch, in some instances extending into the aisle of the church, to which their hostel was attached . . .'.⁴¹

These original church-inns were secularized by the end of the thirteenth century by a series of ordinances and prohibitions by kings and popes, eventually becoming Inns of Chancery, while independent Inns of Court were later established by apprentices-at-law, which became the Inns of Court. The Inns of Chancery have ceased to exist, but the history of the four surviving Inns of Court is, according to ancient sources, intimately connected to the history of the Knights Templars and the Knights Hospitallers, founded in Jerusalem during the Crusades. Makdisi (14–15) speculates that observation of the similarity between Islamic law and English Common Law, as forms of customary law distinct from Roman civil law and canon law, might have impressed the Crusaders. There was indeed a precedent in the case of the returning Crusader, Jocius de Londoniis (John of London), credited with the foundation of the first law-inn in Paris for 18 poor students in 1180, hence its name the Collège des Dix-Huit. Makdisi (16–17) has much evidence to back his claim that:

The scholastic method of disputation was developed by the Islamic legal profession in the ninth, tenth, and eleventh centuries, and later taught in its law schools, then in Bologna as of the twelfth century, was also the method used in the Inns of Court of England. Both systems used the two methods of teaching developed in early Islam and later used in Bologna, Paris, Oxford and elsewhere; namely the lecture and the disputation, which in the Inns of Court were called 'readings' and 'moots'.

There is important legal-institutional continuity, as well. The charitable trust, or *waqf*, which was and remains the enduring legal form of Islamic endowments, has its parallel in the so-called Roman-law ‘corporation’ of the West, which might well have owed its origins to imitation of the Islamic charitable foundation or *waqf*, known in Europe as *mortmain*. Lodgings for students in the early universities of both Paris and Oxford took the form of *hospitia*, but it was only at the point at which they became ‘incorporated’ that they became Colleges in the Roman and civil law senses of *collegia*. The incorporation of Merton College, Oxford, in 1274, was a watershed in the development of the modern college system, followed by the other colleges at Oxford, and Cambridge, who accepted the *Regula Mertonensis* as embodying the ideal of ‘corporate’ collegiate structure.⁴² The model for the Roman-law corporation was always held to be religious, as deriving from the privileged legal status attributed to the religious sodalities of ancient Rome. But the Roman evidence is thin, and it is only with the medieval monastic orders and colleges of learning that we begin to see its appearance. A formidable body of evidence suggests that the legal immunities afforded to the corporation were more likely to have been copied from Islamic institutions, with which they shared other affinities.⁴³ The Franciscans were the first to adopt the corporate immunity of a charitable foundation. Permitted as a religious order to develop an institutional footprint that included property and chattels, the order had a ‘legal personality’, but as individuals they were bound by the poverty of Christ. Gaudiosi notes that ‘while Western legal scholars dispute the origin of the trust in England, whether Roman or Germanic, it is well established that the institution “developed from a medieval English device for holding land known as the use”’; and indeed that, ‘until the enactment of the Statute of Uses in 1535, trusts were commonly referred to as uses’.⁴⁴ The Franciscans are generally credited with the introduction of uses in thirteenth-century England, and the order was active in the Middle East, where Saint Francis himself spent time in 1219 and 1220.

European jurisprudence turns on the so-called Roman Law ‘corporation’ in a many fields, including theory of sovereignty, of financial corporations, and of insolvency. It would indeed be ironic if its provenance were misplaced, and the model of the charitable trust was rather the Islamic *waqf* than the Roman sodality, as looks highly likely. But once again, corporation theory in the modern juristic sense was largely developed as part of the revival of Roman Law in German universities that accompanied the rise of the historical schools of Mommsen, and those scholars who theorized the German Reich under Bismarck, Savigny being foremost among them. Otto Friedrich von Gierke, (1841–1921), the leading exponent of corporation theory in *Das deutsche Genossenschaftsrecht*, (1868–1913, 4 vols: ‘The German Law of Associations’), was a Prussian legal philosopher also teaching at the University of Berlin at the time of the debates around the new German legal code, and a leader of the Germanist school of historical jurisprudence in opposition to Savigny and the Romanist theoreticians of German law. He was highly critical of the first draft (1888) of the civil law code as burdened with Roman law elements at the expense of Germanic law. Von Gierke’s position on German vernacular law was developed in his *Deutsches Privatrecht*, (1895–1917, 3 vols), based on his vision of an ideal state that was a synthesis of *Genossenschaften* (cooperative associations) and *Herrschaften* (groups subordinated to an individual imperious will), which he believed the Reich under Bismarck achieved. His pupil Hugo Preuss was chief draftsman of the German (Weimar Republic) Constitution of 1919, but by now ‘Gierke, who had grown more authoritarian,

attacked the document for its decentralizing tendency'. Gierke's early emphasis on voluntary associations, rather than his later emphasis on unity, had considerable effect on pluralist theory, especially in Great Britain, where the English jurist Frederic William Maitland's *Political Theories of the Middle Age* (1900) was a partial translation of Gierke's *Genossenschaftsrecht*. This brings the history of Roman constitutionalism beyond the Revolutions of the eighteenth century and up to the struggle for Empire of the nineteenth.

5. Antiquity transformation and reformation

What has all this to do with Straumann's *Constitutionalism*, one may well ask. In the first place, to acknowledge the continuity of Ciceronian constitutionalism as an idiom founded on the continuity of the humanist educational curriculum, does not rule out questioning the role of Roman Law in the aetiology of legal institutions. To the extent that we are talking about Roman Law at all, it has already gone through a series of reformations and transmutations, beginning with Justinian's codifications and continuing with reformation of the Church under Hildebrand, Pope Gregory VII, whose policy of centralization and legal codifications made the Papacy the template for fledgling European nation states to imitate; followed, in turn by the codification of canon law under a series of lawyer-Popes from influential Italian merchant families competing with the Arabs for the Mediterranean trade, of whom Innocent III is the most representative.⁴⁵ This unfolding process, brilliantly described in Harold Berman's *Law and Revolution*,⁴⁶ sees a watershed with the Protestant Reformation,⁴⁷ but it does not stop. Early Protestantism is generally credited with a hostility to Roman Law, seen mostly through the lens of canon law, while the Gallican church and the monarchomachs in France, pulled off the impossible, which was to stand it on its head by locating the great *universitas*, not in the Church or the sovereign, but in the people as a corporation. But Roman Law, for too long associated with the papacy, as 'the ghost of the deceased Roman empire sitting crowned upon the grave thereof',⁴⁸ came roaring back with the attempt to consolidate a fragmented sovereignty under the Holy Roman Empire of the German Peoples in a unified German *Reich*, in the period leading up to German Unification in 1870, and continuing into Weimar. We owe the revival of the classics and much of the methodology and ingenuity of the modern social sciences to this impetus, still reflected in the curricula of European universities.

In Britain and France, the revival of Rome and Roman Law was also implicated in imperial projects, beginning earlier with Montesquieu's *Considérations sur les causes de la grandeur des Romains et de leur decadence* (1734) and Gibbon's *Decline and Fall of the Roman Empire* (1776). For proof of the role of the classics in British elite education producing captains of empire, we have colonial Romanists like Syme and Badian, whose genius was to outdo the colonial mother in articulating the ramifications of the Great Game; the revival of Rome being the form that its legitimation and consolidation took. The Great Game goes on and is reaching its tragic denouement in the Middle East, where it has succeeded by persistent iconoclasm in wiping out the claims of the Arabic translation movement and centuries of commentary to have curated the foundational Greek texts of Western civilization, along with the role of Islamic jurisprudence in the formation of Western law. The greatest injury in this long sequence of iconoclastic

acts is to have destroyed all textual evidence, housed until the twenty-first century in libraries and museums of Baghdad, Aleppo and Damascus, but now looted or reduced to rubble in post-colonial wars, so that it is for the most part only through the archives of the West, and particularly Berlin, that these histories could be reconstructed. There is thus no simple story to be told of the history of *Crisis and Constitutionalism*, or even of *Roman Political Thought from the Fall of the Republic to the Age of Revolution*. Nor is any version of it innocent, or immune from the interrogation, 'Cui bono?'⁴⁹ History is indeed no more than stories, but stories burdened with intent. And Straumann has chosen as his subject one of the most successful and pervasive of them. But I wonder for how long?

Notes

1. See Straumann, *Crisis and Constitutionalism*.
2. See Pocock, *The Machiavellian Moment*.
3. See in particular, Skinner, *Reason and Rhetoric, Liberty Before Liberalism, Forensic Shakespeare, From Humanism to Hobbes*.
4. Rokeach, *The Three Christs of Ypsilanti*, the story of three mentally disturbed men in a Michigan clinic, each purporting to be Christ, and Rokeach's failure as a psychoanalyst to persuade them that their claims were mutually invalidating.
5. McIlwain, *Constitutionalism, Ancient and Modern*.
6. In Brunner, Conze, and Koselleck, eds., *Geschichtliche Grundbegriffe*.
7. Veyne, *Did the Greeks Believe in their Myths?* My brief remarks here hardly do justice to the sophistication of Veyne, a fine Romanist. For a fuller account see the review by Marilyn A. Katz.
8. See Pocock, *The First Decline and Fall*, 19–20.
9. Pocock, *The First Decline and Fall*, 43.
10. See Fabio Guidetti, "An accusation against the gods".
11. Schmitt's *Die Diktatur*, discussed the position of *Reichspräsident*. in the newly established Weimar Republic, emphasizing the power granted to the president to declare a state of exception (*Ausnahmezustand*). Although the German concept of *Ausnahmezustand* is best translated as 'state of emergency', it literally means 'state of exception' because, according to Schmitt, it frees the executive from any legal restraints to its power that would normally apply. See Agamben, *State of Exception*, and Tuori 'Schmitt and the Sovereignty of Roman Dictators'.
12. Friedell, *Kulturgeschichte der Neuzeit*, 3, 270, cited in the *Wikipedia* entry for Mommsen, to which I am indebted for this sketch of Mommsen.
13. Gelzer, *Die Nobilität der römischen Republik*, 1912 and Münzer, *Römische Adelsparteien und Adelsfamilien*, 1920.
14. See Pocock, *The Ancient Constitution and the Feudal Law*.
15. See Daniel Lee, "Hobbes and the Civil Law," 216.
16. Straumann, *Crisis and Constitutionalism*, 1.
17. See Skinner, *Forensic Shakespeare*.
18. Springborg, *Reflections on Orientalism and Despotism*; see also Springborg, *Politics, Primordialism and Orientalism, Western Republicanism and the Oriental Prince*, which has chapters on the Persian Mirrors for Princes and Ibn Khaldun's cycle of regimes; and Springborg, *Constitutionalism, Ancient and Oriental*.
19. See Chroust's excellent study, "The Legal Profession in Ancient Rome," 521.
20. See Sherman, "The Study of Law in Roman Law Schools," 500.
21. See Sherman, 502, 503: 'Distinguished jurists, especially from the time of Alexander Severus (117–235 A. D.), were in the habit of writing elementary treatises for the use of students. Papirius Justus, Callistratus, Paulus, Marcian, Florentinus, and Gaius all published

- “Institutiones.” Paulus also published his “Sententiae,” and Ulpian his “Regulae” . . . while Ulpian, whose writings form the ground- work of the *Digest of Justinian*, and who died nearly one hundred years after Hadrian, wrote a commentary in fifty-books on Sabinus’. See also Kuttner, *Renaissance and Renewal in the Twelfth Century*.
22. Paul Collinet, *Histoire de l'école de droit de Beyrouth*, 30–32.
 23. See Eusebius of Caesarea, Wikipedia entry, https://en.wikipedia.org/wiki/Eusebius#cite_note-66, quoting Gibbon, *Decline and Fall of the Roman Empire*, Vol II, Chapter XVI. For a fuller account of the Byzantine Ecclesiastical Historians, especially Eusebius of Caesarea (c. 260–340), the Palestinian lawyer Sozoman (c. 380–450), Socrates of Constantinople (c. 380; d. after 439), the Syrians, Evagrius Scholasticus (537–94) and Theodoret (393–458), see Springborg, “The Politics of Hobbes’s *Historia Ecclesiastica*”, and Springborg’s ‘Introduction’ to Springborg et al., *Hobbes’s “Historia Ecclesiastica”*. While disagreeing with Gibbon that the ecclesiastical historians were unreliable, one could not deny that, as lawyers for the most part, they were adversarial and tendentious, probably reminding Hobbes of the invective and wrangling of the heresiarchs of his own day.
 24. See Kuttner, *Renaissance and Renewal in the Twelfth Century*, 299–300.
 25. Stein, *Roman Law in European History*, 35–6.
 26. Mousourakis, *The Historical Institutional Context of Roman Law*, 405–84.
 27. See Sedlar, *East Central Europe in the Middle Ages, 1000–1500*, 306–7.
 28. Stein, *Roman Law in European History*, 35f.
 29. See Runciman, “Gibbon and Byzantium,” 103, citing Gibbon, *History of the Decline and Fall*, chap. 6, 169–71.
 30. Fowden, “Gibbon on Islam,” 261.
 31. Fowden, “Gibbon on Islam,” 261, citing *Miscellaneous Works of Edward Gibbon*, i. 555.
 32. See Enan, *Ibn Khaldun*, 150–51.
 33. See Pocock, “The Desert and the City,” 31. Pocock gives the date of Herbelot’s work as 1675, but that is not corroborated in any sources I have been able to consult. He died in 1695 and the work was completed in 1697 by his collaborator A. Galland, and had another printing in 1776, the year of publication of the first volume of Gibbon’s *Decline and Fall*. I want to acknowledge my debt to Pocock, having been privileged to read both of his articles on Ibn Khaldun in typescript. It is partly in response to them, in a written conversation between us, that I have been prompted to develop the project I refer to as ‘Antiquity Transformation and Islamic Jurisprudence’. In this essay I draw on that correspondence.
 34. I greatly respect Pocock’s daring departure, without entirely agreeing with him. Pocock finds Ibn Khaldun’s fourteenth century anticipation of eighteenth century European Enlightenment historiography hard to place. But Ibn Khaldun was late in the cycle of the translation movements and commentators, himself a commentator on Avicenna; and one cannot underestimate the degree to which he might have been influenced by Stoic, Epicurean and Sceptic rationalist accounts – in particular that of the Presocratic Democritus, which laid the basis for accounts of the rise of civilization from Plato, through the Byzantine poet and grammarian Tzetzes (c. 1110–1180), Hobbes, Rousseau and eventually Gibbon, up to Marx. See Cole, *Democritus and the Sources of Greek Anthropology*. See also Springborg, *The Problem of Human Needs*. Without yet being able to reconstruct all the sources for Ibn Khaldun’s account, I agree with the general assessment of Stephen Dale, who maintains:

Scholars continue to discuss the *Muqaddima* largely within the context of Islamic historiography, even though most of them regard it as an anomaly that differs fundamentally from the works of other Muslim historians. In certain respects, the *Muqaddima* belongs to an Islamic historical tradition, that of al-Tabari and al-Mas’udi. Yet, its dominant intellectual lineage is the rationalist thought that stretches from the Peripatetic philosophers, and especially from Aristotle (384–322 BCE), through such Greco-Islamic thinkers as al Farabi (870–950 CE), Ibn Sina (980–1037 CE), and Ibn Rushd (1126–1198 CE) onward to European philosophical historians and sociologists of the 18th, 19th, and 20th centuries. It is precisely because Ibn Khaldun (1332–1406

CE) used the logical apparatus and materialist assumptions of this rationalist tradition as the conceptual basis for his new historical science that he can be characterized as the last Greek historian. He can be considered the first *Annaliste* historian because the same Greek philosophical heritage influenced both the sociologist Emile Durkheim, who wrote his Latin dissertation on Montesquieu (1689–1755 CE), and also Durkheim's student, Marc Bloch, the cofounder of the *Annales* School. This heritage is also visible in an attenuated form in Ferdinand Braudel's distinction between the *longue durée* and the history of events. Indeed, Ibn Khaldun developed what modern scholars would identify as a structuralist methodology, using classical logic to identify enduring socioeconomic realities underlying cultural phenomena and ephemeral events, what he describes as the 'general conditions of regions, races and periods that constitute the historian's foundation'.

Dale, "Ibn Khaldun," 431. Pocock has read Dale's *The Orange Trees of Marrakesh*, which sets Ibn Khaldun in the tradition not only of Aristotle, but also of Montesquieu, Smith, and Durkheim, but I think he has not read this essay. Stephen Dale is an historian of Eurasian empires of great breadth. His earlier studies include Eurasian trading networks of Indian merchants in the seventeenth and eighteenth, from Russian sources (1994); a biography of Babur, the founder of the Mughal Empire of India, (2004), based on research in Chaghatai Turkish, Persian and Russian sources; and a comparative study of the Ottoman, Safavid and Mughal Empires (2010).

35. Gutas, *Greek Thought, Arabic Culture*, 17, 20–22, 153.
36. See Gutas, 153, which references his own *Avicenna and the Aristotelian Tradition*, 125–7.
37. See Makdisi, "The Scholastic Method in Medieval Education," 649.
38. See Makdisi, "The Scholastic Method in Medieval Education," 657. For a full elaboration of the rise of the College system and its institutional basis in the charitable foundation, or *waqf*, see Makdisi, *The Rise of Colleges*.
39. See Grabar, *The Formation of Islamic Art*.
40. See George Makdisi, "Inquiry into the Origins of the Inns of Court," 12.
41. Makdisi, "Inquiry into the Origins of the Inns of Court," 12, citing Ingpen, *History and Constitution of the Honourable Society of the Middle Temple*, 11.
42. See the article by Makdisi's doctoral student, Gaudiosi, "The Case of Merton College," who cites Cattani, "The Law of *Waqf*," describing general similarities and differences between the *waqf* and the early English trust or 'uses'.
43. See George Makdisi, "An Inquiry into the Origins of the Inns of Court," 12. See also a series of articles by his son, John A. Makdisi, "Legal Logic and Equity in Islamic Law," "Formal Rationality in Islamic Law and the Common Law," and "The Islamic Origins of the Common Law."
44. Gaudiosi, "The Case of Merton College," 1240, cites an impressive range of English legal sources.
45. Innocent III, Lothario de Segni, Pope 1198 to 1216, who studied theology in Paris and (possibly) jurisprudence in Bologna, was an aggressively military pope who cancelled the Magna Carta because he deemed that King John gave to his people rights that, as a vassal, were deemed not to be in his power. He played a major role in the shaping of canon law through conciliar canons and decretal letters. He was a member of a famous house, Conti di Segni (Earl of Segni), which produced nine popes, including Gregory IX, Alexander IV and Innocent XIII. Lothario was also the nephew of Pope Clement III; his mother, Claricia Scotti (Romani de Scotti), was from the same noble Roman family. Innocent IV, Pope from 1243 to 1254, born in Genoa as Sinibaldo de Fieschi, who had a particularly active policy in the Muslim East, came from a noble merchant family of Liguria. Following Innocent IV's election his nephew, Opiso dei' Fieschi, was appointed the Catholic patriarch of Antioch (probably in 1247 and possibly serving as long as the fall of Antioch in 1268). Sinibaldo de Fieschi received his education at the universities of Parma and Bologna and, for a time, taught canon law at Bologna. The invention of the concept of *persona ficta*, is attributed to him. (See *Wikipedia* for both Popes.)

46. See Berman, *Law and Revolution*. I deal at greater length with Berman's thesis and the role of canon law in subsuming Roman civil law in my unpublished essay, "Hobbes and Roman Law," invited paper presented to The European Hobbes Network Conference, University of Padua, Italy, February 15–16, 2018.
47. See Seipp, "The Reception of Canon Law and Civil Law." Seipp notes what he calls the 'enemy theory' of hostility to 'learned' law, which lumped Canon Law and Roman Civil Law together as emanations of empire and papacy. His quantitative survey of English common law from 1400 to 1600 finds that references to "'civilians' and 'doctors of civil law' giving opinions about canon law matters before 1500' were rare. But they increased dramatically after 1530, the reason being, we must conclude, that hostility to Roman law as Popish under the Reformation, produced a fudge, so '[n]ot all of these references are to Roman law or to the *ius commune* common to civilian and canonist learning. The new preferred term for speaking about what we now call canon law became "civil law"'.
48. Hobbes, *Leviathan* [1651], xlvii, 21, 387/483.
49. Hobbes opens *Leviathan* [1651], xlvii, 1, 381/477 on the Kingdom of Darkness with a nice Ciceronian statement of intent, under the title 'He that receive the benefit by a Fact is presumed to be the Author':

Cicero maketh honourable mention of one of the Cassii, a severe judge amongst the Romans, for a custom he had in criminal causes (when the testimony of the witnesses was not sufficient) to ask the accusers: *cui bono*? (that is to say, what profit, honour, or other contentment the accused obtained or expected by the fact). For amongst presumptions there is none that so evidently declareth the author as doth the benefit of the action. By the same rule I intend in this place to examine who they may be that have possessed the people so long in this part of Christendom with these doctrines, contrary to the peaceable societies of mankind.

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